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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

) No. P1300CR20081339

) Div. 6

) **REPLY IN SUPPORT OF**
) **MOTION TO COMPEL THE**
) **STATE TO MAKE A PROPER**
) **PROFFER FOR WITNESSES,**
) **CLARIFY ITS WITNESS LIST**
) **AND PRECLUDE IT FROM**
) **CALLING WITNESSES WITH**
) **NO RELEVANT, ADMISSIBLE**
) **TESTIMONY**

The State's response fails to address its failures to comply with this Court's orders, Rule 15.1, its' own agreement to provide proffers, or its violations of Mr. DeMocker's constitutional rights. Instead, for the first time in its response, the State makes unfounded complaints that defense disclosures made beginning in July 2009 are

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

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JEANNE HICKS, CLERK

BY: Heather Figueroa

1 somehow inadequate. The defense has repeatedly raised the issue of the State's bloated
2 witness list and inadequate disclosures with the State and the Court. The State has
3 never before raised any issues with the defense disclosures prior to raising issues in this
4 response. The State's attempt to obfuscate its obvious failures should not succeed in
5 distracting the Court from the serious problems the State's failures have created for the
6 defense in this case.

7 The Court previously ordered the State to provide proffers and a pared down
8 witness list. The proffer was to be as to "whatever witnesses are likely to be allowed to
9 testify" to at trial. This was not an "informal agreement" as suggested in the State's
10 response. It was pursuant to a motion by the defense and the Court indicated it would
11 "plan on" the State making proffers as to specific witnesses at a hearing on March 2.
12 The State agreed that it would be prepared to do so on March 2. At a hearing on March
13 2, the State advised the Court that it would submit the proffers in writing to the defense.
14 The State then ignored the Court's orders and its own promises and failed to provide
15 meaningful proffers.

16 The State's response appears to be 1) it does not have to provide a proffer; and 2)
17 the defense did not provide a proffer. First, while Rule 15.1 may not require a proffer,
18 the Court specifically ordered the State to provide a proffer with respect to specific
19 identified witnesses and the State agreed to provide a full proffer with respect to those
20 witnesses. As the defense pointed out in its motion, with respect to several identified
21 witnesses, there has either been no disclosure or the disclosure is such that it is clear that
22 these witnesses have nothing admissible and relevant to testify to in this case. Second,
23 the State did not request that the defense provide a proffer with respect to any witness,
24 the Court did not order the defense to provide a proffer as to any witness, and the
25 defense did not agree to provide a proffer. Perhaps most importantly (and stunningly
26 overlooked by the State yet again), Mr. DeMocker has constitutional rights that the
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1 State does not have with respect to expected testimony in this case, particularly in a
2 death penalty case. These rights include those arising under the Confrontation Clause in
3 the Sixth Amendment, the Due Process Clause and the Eighth Amendment and the
4 Arizona counterparts.

5 As the Arizona Supreme Court noted in *State v. Lawrence*, 112 Ariz. 20, 536
6 P.2d 1038 (1975), “[t]he underlying principle of Rule 15 is adequate notification to the
7 opposition of one's case-in-chief in return for reciprocal discovery so that undue delay
8 and surprise may be avoided at trial by both sides.” 112 Ariz. at 22, 536 P.2d at 1040.
9 The disclosure provided and the State's inadequate proffers with respect to each listed
10 witness is not adequate to give the defense notice and avoid surprise. Where a proffer
11 fails to provide the Court with sufficient proof of relevance, a witness may be excluded.
12 See e.g. *State v. Tamplin*, 126 Ariz. 175, 613 P.2d 839 (Ariz. App. 1980); *State v.*
13 *Fendler*, 127 Ariz. 464, 622 P.2d 23 (Ariz. App. 1980). The State's proffer does not
14 provide sufficient evidence of relevance for any of these witnesses. Nor does its
15 response address what “not a witness” means, how any witness complies with the
16 specificity required for rebuttal testimony, or how any witness meets the requirements
17 of Rule 402 and 403, or this Court's *in limine* rulings and 404(b) holdings.

18 Therefore, the Court should order that the State: 1) make a proper proffer
19 regarding selected witnesses (David Soule, Debbie Hill, Debbie Kasprzak, Jeff Zyché,
20 and Dean Shank) as previously ordered; 2) disclose a witness list in compliance with
21 Rule 15.1 and this Court's orders; and 3) is precluded under the Rules of Evidence from
22 offering testimony from the following witnesses: Sally Butler, Jana Johnson, Dr. Diane
23 Cornsweet, Cody Buchser, Nikki Check, Sean Bailey, Morgan Jay, Mike Bueler, Lynn
24 Shoopman, Debbie and Terry Sims, Dr. Markham, Catherine and Larry Peterson,
25 Tommy Meredith, Sturgis Robinson, Jill Dyer, Dr. Rubin, Dr. Wineberg, Don Wood,
26 Carol Tidmarsh, and Richard Ach.

1 As to the State's unfounded and unsupported allegations about defense
2 disclosures, there are no recordings of defense interviews to disclose nor do any expert
3 reports exist. This is because defense experts are engaged in part to examine the
4 performance of State's experts and **the State has still not disclosed the reports of**
5 **many of its experts.** This makes the defense experts unable to prepare or complete any
6 examination. The defense, like the State, is under no obligation to notify the State in
7 advance of its interviews. The defense disclosure obligations under Rule 15.2 follow
8 the completion of the State's and are, in fact, suspended when the State fails to comply
9 with its obligations under Rule 15.7. Given that the State continues to make
10 disclosures, the defense is obviously not in a position to complete its disclosures.¹
11 While it is true that both parties have disclosure obligations under Rule 15, Mr.
12 DeMocker also has constitutional rights that the State's repeated violations of the Rules,
13 the Court's orders, and its own agreements are in violation of – including the right to
14 Due Process, Confrontation and, in a death penalty case, rights arising under the Eighth
15 Amendment. The State's complaints are an obvious attempt to obfuscate its own
16 continued and ongoing failures to comply with the Rules, the Court's orders and Mr.
17 DeMocker's constitutional rights. This attempt should fail.

18 CONCLUSION

19 Defendant Steven DeMocker, by and through counsel, hereby requests that this
20 Court order the State to provide detailed proffers within five days for these witnesses
21 upon threat of exclusion, preclude the State from offering witnesses who have no
22 relevant and admissible testimony and order the State to disclose a witness list in
23 compliance with Rule 15.1 and this Court's Orders.

24 DATED this 24th day of March, 2010.

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27 ¹ The 51st supplemental disclosure from the State was just delivered on March 23, 2010.

By: 

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ORIGINAL of the foregoing hand delivered for
filing this 24th day of March, 2010, with:

Jeanne Hicks
Clerk of the Court
Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

COPIES of the foregoing hand delivered this
this 24th day of March, 2010, to:

The Hon. Thomas B. Lindberg
Judge of the Superior Court
Division Six
120 S. Cortez
Prescott, AZ 86303

Joseph C. Butner, Esq.
Prescott Courthouse Box

